Supreme Court, U.S.
FILED
OCT 24 1994
OFFICE OF THE CLERK

No. 94-594

In The

Supreme Court of the United States

October Term, 1994

KEN NASH,

Petitioner,

v.

HALLIBURTON COMPANY AND COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT HALLIBURTON COMPANY'S BRIEF IN OPPOSITION

DONALD F. WOOD
Counsel of Record

VINSON & ELKINS L.L.P.
1933 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2608

Counsel for Respondent Halliburton Company

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

23 pp

QUESTIONS PRESENTED FOR REVIEW

(1) Whether the decisions of the United States Tax Court and the United States Court of Appeals for the Fifth Circuit in this case failed to adhere to this Court's ruling in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), by not deferring to either (i) the positions of the District Director and Appeals Officer of the Internal Revenue Service expressed in a proposed adverse determination letter or (ii) the position of the Commissioner set forth in briefs as a party to this litigation in the Tax Court and the Fifth Circuit;

(2) Whether the Fifth Circuit's holding in this case is in conflict with the Second Circuit's decision in *Weil v. Retirement Plan Administrative Committee of Terson Co.*, 933 F.2d 106 (2d Cir. 1991), with respect to the application of *Chevron*; and

(3) Whether certiorari should be granted because the substantive issue involved in this case "affects large numbers of persons."

LIST OF NON WHOLLY-OWNED SUBSIDIARIES OF HALLIBURTON COMPANY[1]

Following is a list of entities in which Halliburton Company directly owns an interest of less than 100 percent:[2]

Entity Name	Ownership <100%	Country of Incorporation
Amsito Oilwell Services (Malaysia) Sdn Bhd	49.00000	Malaysia
Corporate Officers & Directors Assurance Ltd	1.88679	Bermuda
Gearhart Espana SA	1.00000	Spain
Goinbras Industria E Comercio do Brasil Ltda	0.20000	Brazil
GSI Saudi Arabia Limited	75.00000	Saudi Arabia
Halliburton Cementacao Limitada	99.99835	Brazil
Halliburton do Brasil-Servicos, Comercio e Ind Ltda	99.97642	Brazil
Halliburton Geophysical Argentina SA	99.99994	Argentina
Halliburton Geophysical Services (M) Sdn Bhd	70.00000	Malaysia

---

[1] There is no parent company of Halliburton Company.

[2] Each ownership percentage reflects Halliburton Company's interest owned directly without the application of the constructive ownership rules of the Internal Revenue Code of 1986, as amended.

LIST OF NON WHOLLY-OWNED SUBSIDIARIES OF HALLIBURTON COMPANY – Continued

Entity Name	Ownership <100%	Country of Incorporation
Halliburton Geophysical Services de Mexico SA CV	99.99998	Mexico
Halliburton Holdings, Inc	42.14876	United States
Halliburton Oilfield Services India Ltd	60.00000	India
Halliburton Services (Malaysia) Sdn Bhd	49.00000	Malaysia
Halliburton Servicios Petroleros (Chile) Ltda	92.06349	Chile
Halliburton Servicos Geofisicos, Ltda	0.00011	Brazil
Halliburton Trinidad, Ltd.	99.99500	Trinidad
Halliburton West Africa Limited	99.88889	United States
Halliburton West Africa Limited	99.88889	Cayman Islands
HGS Enterprises, Inc	81.82185	Panama
HGS India Limited	9.71251	India
HLS do Brasil Servicos de Perfilagem Ltda	0.00069	Brazil
IMCO Services (UK) Limited	82.00000	England
M-I Drilling Fluids Canada Inc	36.00036	Canada
M-I Drilling Fluids Company	36.00000	United States
Mashhor Well Services Sdn Bhd	70.00000	Brunei

LIST OF NON WHOLLY-OWNED SUBSIDIARIES OF HALLIBURTON COMPANY – Continued

Entity Name	Ownership <100%	Country of Incorporation
MIHC, Inc	10.00000	United States
Nigeria Surveys Limited	98.00000	Nigeria
Otis Engineering Italiana, SRL	99.44444	Italy
Productos Industriales de Veracrus, SA de CV	49.00000	Mexico
PT Halliburton Drilling Systems Indonesia	80.00000	Indonesia
PT IMCO Services, Indonesia	65.00000	Indonesia
PT Udemco Otis Indonesia	80.00000	Indonesia
Quimicas do Brasil Limitada	99.99973	Brazil
Reservoir Monitoring, Inc	50.00000	United States
Tianjin Orient Halliburton Geophysical Service Company Ltd	5.10000	China
Tri-Can Perforators Ltd	77.01530	Trinidad

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED FOR REVIEW i

LIST OF NON WHOLLY-OWNED SUBSIDIARIES OF HALLIBURTON COMPANY ii

TABLE OF CONTENTS v

TABLE OF AUTHORITIES vi

OPINIONS AND JUDGMENTS IN COURTS BELOW 2

STATEMENT OF JURISDICTION 2

STATEMENT OF THE CASE 2

SUMMARY OF ARGUMENT 5

REASONS FOR DENYING THE WRIT 6

I. THE FIFTH CIRCUIT AND THE TAX COURT OPINIONS IN THIS CASE DO NOT VIOLATE THE PRINCIPLES OF THIS COURT'S OPINION IN *CHEVRON* 6

II. THE FIFTH CIRCUIT'S HOLDING IN THIS CASE DOES NOT CREATE A CIRCUIT SPLIT WITH THE SECOND CIRCUIT REGARDING THE APPLICATION OF *CHEVRON* 12

III. THIS CASE DOES NOT INVOLVE A QUESTION OF IMPORT TO THE GENERAL PUBLIC THAT SHOULD BE ADDRESSED BY THIS COURT 13

CONCLUSION 14

TABLE OF AUTHORITIES

Page

CASES

Anchor Hocking Corp. v. United States, 11 Cl. Ct. 173 (1986) 10

Bowen v. Georgetown Univ. Hosp., 488 U.S. 204 (1988) 11

Brown v. United States, 890 F.2d 1329 (5th Cir. 1989) 9

Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837 (1984) ..... i, *passim*

Crow v. Commissioner, 85 T.C. 376 (1985) 8

CWT Farms, Inc. v. Commissioner, 755 F.2d 790 (11th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986) 9

Davis v. United States, 495 U.S. 472 (1990) 10

Dresser Indus., Inc. v. Commissioner, 911 F.2d 1128 (5th Cir. 1990) 9

Gordon v. Commissioner, 88 T.C. 630 (1987) 10

Higgins v. Commissioner, 312 U.S. 212 (1941) 8

Johnson City Medical Center v. United States, 999 F.2d 973 (6th Cir. 1993) 10

Lewis v. Grinker, 965 F.2d 1206 (2d Cir. 1992) 12

McKnight v. Commissioner, 7 F.3d 447 (5th Cir. 1993) 9

Nalle v. Commissioner, 997 F.2d 1134 (5th Cir. 1993) 9

Reich v. New York, 3 F.3d 581 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 1187 (1994) 9, 10

TABLE OF AUTHORITIES – Continued

Page

Skandalis v. Rowe, 14 F.3d 173 (2d Cir. 1994)..... 12

Stinson v. United States, 113 S.Ct. 1913 (1993).....7, 9

Stubbs v. Overbeck & Associates, Inc. v. United States, 445 F.2d 1142 (5th Cir. 1971)..... 8

Wachtell, Lipton, Rosen & Katz v. Commissioner, 26 F.3d 291 (2d Cir. 1994).....12, 13

Watts v. United States, 703 F.2d 346 (9th Cir. 1983) 10

Weil v. Retirement Plan Administrative Committee of Terson Co., 933 F.2d 106 (2d Cir. 1991) 5, 10, 12

Williams Bros., Inc. v. Pate, 833 F.2d 261 (11th Cir. 1987)..... 11

STATUTES AND RULES

28 U.S.C. § 1254.....2, 11

28 U.S.C. § 1346(a)(1)..... 11

I.R.C. § 401(a)..... 2

I.R.C. § 402(a)..... 2

I.R.C. § 404(a)..... 2

I.R.C. § 411(d)(3) 3, 6, 7, 8, 9, 12

I.R.C. § 501(a)..... 2

I.R.C. § 6213 11

I.R.C. § 7422 11

I.R.C. § 7476 .....4, 11

TABLE OF AUTHORITIES – Continued

Page

I.R.C. § 7805(a) 9, 10

Tax Court Rule 217(a) 4

TREASURY REGULATIONS

Treas. Reg. § 1.411(d)-2(b)(1) 3

Treas. Reg. § 1.7476-1(b) 4

Treas. Reg. § 601.105 8

Treas. Reg. § 601.106 8

Treas. Reg. § 601.601 8

No. 94-594

In The

Supreme Court of the United States

October Term, 1994

KEN NASH,

Petitioner,

v.

HALLIBURTON COMPANY AND COMMISSIONER OF THE INTERNAL REVENUE SERVICE,

Respondents.

Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

RESPONDENT HALLIBURTON COMPANY'S BRIEF IN OPPOSITION

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

Respondent Halliburton Company respectfully requests that the Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit be denied.

OPINIONS AND JUDGMENTS IN COURTS BELOW

Following are citations to the opinions and judgments in this case rendered in the courts below:

Halliburton Company v. Commissioner, 100 T.C. 216 (1993).

Halliburton Company, by Ken Nash, Employee v. Commissioner, 100 T.C. 216 (1993).

Halliburton Company, by Ken Nash, Employee v. Commissioner, 25 F.3d 1043 [1994 U.S. App. LEXIS 15075 (Doc. No. 93-4978)] (5th Cir. 1994).

Halliburton Company v. Commissioner, 25 F.3d 1043 [1994 U.S. App. LEXIS 15076 (Doc. No. 93-4996)] (5th Cir. 1994).

STATEMENT OF JURISDICTION

The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Since 1944 Halliburton Company ("Halliburton") has maintained the Halliburton Profit Sharing and Savings Plan ("Plan" or "Halliburton Plan") for the benefit of its employees. The Halliburton Plan is a "qualified" defined contribution retirement plan meeting the requirements of section 401(a) of the Internal Revenue Code of 1986, as amended, ("Code") and is entitled thereby to certain tax-favored treatment. I.R.C. §§ 401(a), 402(a), 404(a), 501(a). The Plan provides, as required, that upon its "partial

termination" the rights of all affected employees to benefits accrued to the date of that partial termination are fully vested and nonforfeitable. I.R.C. § 411(d)(3).

Whether a partial termination has occurred in order to trigger full vesting of the affected participants is determined with regard to all the facts and circumstances of a particular case. Treas. Reg. § 1.411(d)-2(b)(1). One of these facts and circumstances includes the exclusion from plan participation, by reason of employment severance, of a group of employees previously covered by the plan. *Id.*

As a result of a severe downturn in the petroleum industry, Halliburton had a reduction in its workforce during 1986. In light of this workforce reduction, in April 1987 Halliburton filed with the Dallas District Director of the Internal Revenue Service (sometimes referred to herein as "Service") an application for a determination that, under the facts and circumstances surrounding the workforce reduction, a partial termination of the Halliburton Plan did not occur in 1986. After considering Halliburton's application for seventeen months, on September 7, 1988, the District Director proposed to issue a determination letter concluding that a partial termination of the Halliburton Plan had occurred. However, after two additional years of administrative consideration, the Service still had not made a final determination on the partial termination issue. During the entire administrative process, Halliburton complied with all requests by the Commissioner for additional information relating to the partial termination inquiry.

Having received no final administrative determination, on November 21, 1990 (more than three and one-half

years after its initial request for a determination) Halliburton filed suit in the Tax Court under Code section 7476(a)(2).[3] Halliburton requested a declaratory judgment that no partial termination of the Halliburton Plan had occurred in 1986 and that the Plan remained qualified under Code section 401(a). Two months later, Mr. Nash, a former Halliburton employee terminated in 1986, also filed a Tax Court petition, requesting a declaratory judgment that the Halliburton Plan had been partially terminated in 1986. As a Halliburton Plan participant, Mr. Nash was an "interested party" with standing to file such an action. *See* Treas. Reg. § 1.7476-1(b). The Tax Court consolidated the two cases for briefing and opinion.

Pursuant to Tax Court Rule 217(a), these actions were decided solely on the basis of the administrative record, which was voluminous. The parties stipulated in the Tax Court that the exhibits contained in the administrative record constituted the entire record and are genuine.

On March 24, 1993, the Tax Court ruled that a partial termination of the Halliburton Plan had not occurred. Both the Commissioner and Mr. Nash appealed this decision to the Fifth Circuit Court of Appeals, which consolidated the appeals for briefing and opinion.

On May 31, 1994, the Fifth Circuit affirmed the Tax Court decision by per curiam opinion. Mr. Nash has filed a petition for writ of certiorari requesting that the Fifth Circuit opinion be reviewed. The Commissioner did not

---

[3] Contrary to Mr. Nash's statement in his petition, the Service never issued a final determination that a partial termination of the Halliburton Plan had occurred.

seek rehearing in the Fifth Circuit and has not petitioned this Court for writ of certiorari.

SUMMARY OF ARGUMENT

This Court's decision in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984), does not require that deference be given either (i) to the position of the District Director or the Appeals Officer of the Internal Revenue Service, taken during the administrative consideration of Halliburton's determination request, or (ii) to the position of the Commissioner of Internal Revenue fashioned as a litigating party in the Tax Court and the Fifth Circuit. In neither capacity was the Service promulgating a statutory interpretation "by the agency." Furthermore, the Service's statutory construction was not made in a rulemaking capacity. It was neither a legislative regulation entitled to *Chevron* deference, nor an interpretive regulation or ruling entitled to some lesser degree of deference. The Service's position in this case was expressed solely as a party involved in a fact specific controversy with a taxpayer.

The Fifth Circuit's decision below is not in conflict with the Second Circuit's decision in *Weil v. Retirement Plan Administrative Committee of Terson Co.*, 933 F.2d 106 (2d Cir. 1991). In *Weil*, the Second Circuit did not defer to the position of the Service as a litigating party. Furthermore, there is no suggestion in *Weil* that the Second Circuit would defer to the Service's position where that position is merely a litigating position as in this case. In fact, in post-*Chevron* cases, the Second Circuit has refused

to defer to an agency's litigation posture regarding statutory application or interpretation. Thus there is no circuit split created by the Fifth Circuit's decision in this case.

Finally, there is no overriding issue of public importance that need be addressed in this case. The determinations below were fact specific and involved no erroneous application of law. Granting certiorari would not serve any public weal or provide any needed resolution of an important federal question.

REASONS FOR DENYING THE WRIT

I. THE FIFTH CIRCUIT AND THE TAX COURT OPINIONS IN THIS CASE DO NOT VIOLATE THE PRINCIPLES OF THIS COURT'S OPINION IN *CHEVRON*

Mr. Nash argues that certiorari should be granted because the Tax Court and the Fifth Circuit failed to give deference to a statutory interpretation of Code section 411(d)(3) by the Internal Revenue Service under the principles enunciated in *Chevron U.S.A. Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). Mr. Nash apparently claims that *Chevron* deference is so broad as to extend to the Service's position as an advocate that, under the facts and circumstances in the record, a partial termination of the Halliburton Plan occurred in 1986. It is true that the Tax Court reached the opposite conclusion based upon all the facts and circumstances. It is also true that the Commissioner, as a party litigant, made arguments as to the significance of certain factual circumstances, which the Tax Court found unpersuasive.

None of those arguments, however, was due *Chevron* deference. Simply put, neither the Tax Court ruling, nor the Fifth Circuit affirmance of that ruling, runs afoul of *Chevron*, properly applied.

Chevron involved a direct appeal from an administrative promulgation of a legislative regulation, pursuant to an express Congressional grant of authority. *Chevron*, 467 U.S. 840-41, 859. In that context, this Court held that, if a statute is silent or ambiguous with respect to a specific issue, the agency's interpretation of the statute should be given deference if it is a permissible construction. *Chevron*, 467 U.S. at 842-843, 865. The agency's position is entitled to deference under *Chevron* only where the statute is silent or ambiguous with respect to the issue and the agency's construction is promulgated in its "rulemaking capacity." *See Stinson v. United States*, 113 S.Ct. 1913, 1918 (1993). Even assuming Code section 411(d)(3) is silent or ambiguous with respect to the issues involved in this case, the other elements justifying *Chevron* deference are not present.

The Service's Position in This Case Did Not Constitute a Statutory Interpretation Made "By the Agency"

The Service's views expressed in this case regarding application of Code section 411(d)(3) did not constitute a construction "by the agency" authorized to administer the statute. The agency positions regarding statutory construction and application were made (i) by the District Director and the Appeals Officer in the process of examining a determination request by Halliburton and (ii) by the Commissioner as a party to litigation in the courts

below. This context is far afield from the formal delegated rulemaking procedure involved in *Chevron*.

A construction by a District Director cannot be deemed an interpretation "by the agency" authorized to administer the relevant statute. In the Department of the Treasury, the official immediately in charge of the Internal Revenue Service is the Commissioner of Internal Revenue. The Commissioner is assisted in administration of the internal revenue laws by Assistant Commissioners, Regional Commissioners, and District Directors. There are fifty-eight Internal Revenue Districts. The District Director's office is the one with which the taxpayer has contact. All functions related to the assessment and collection of taxes are vested in the District Director's offices. However, neither District Directors nor Appeals Officers (to whom a taxpayer may appeal a proposed adverse determination by a District Director) are vested with rulemaking authority on behalf of the Treasury. *See* Treas. Reg. §§ 601.105, 601.106, 601.601.

Furthermore, a position regarding the proper application of a statute taken by the Commissioner during or for the purposes of litigation does not qualify as an interpretation "by the agency." It is merely the biased contention of one of the parties to the litigation. Accordingly, such an interpretation is not made by the agency and is due no deference. *See, e.g., Higgins v. Commissioner*, 312 U.S. 212, 215 (1941); *Stubbs v. Overbeck & Associates, Inc. v. United States*, 445 F.2d 1142, 1146-47 (5th Cir. 1971); *Crow v. Commissioner*, 85 T.C. 376, 389 (1985).

Therefore, neither the District Director's and the Appeals Officer's application of Code section 411(d)(3) in

the proposed adverse determination, nor the position advanced by the Commissioner in her Tax Court and Fifth Circuit briefs, constitutes a statutory construction "by the Treasury," i.e., the agency charged with administering the relevant statute.

The Service's Position in This Case Was Not Articulated in its Rulemaking Capacity

Even were the positions of the Service regarding the application of Code section 411(d)(3) in this case deemed to be the official position of the agency, *Chevron* deference is due to a governmental agency's interpretation only when such interpretation is the "product of delegated authority for rulemaking." *See Stinson*, 113 S.Ct. at 1918. Statutory interpretations of the Internal Revenue Code in the form of Treasury regulations are given *Chevron* deference if they are "legislative regulations," i.e., issued by the Treasury under a specific Congressional grant of authority. *E.g., McKnight v. Commissioner*, 7 F.3d 447, 450 (5th Cir. 1993); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993), *cert. denied*, 114 S.Ct. 1187 (1994); *Nalle v. Commissioner*, 997 F.2d 1134, 1138 (5th Cir. 1993); *Dresser Indus., Inc. v. Commissioner*, 911 F.2d 1128, 1137-38 (5th Cir. 1990).

Post-*Chevron* cases have applied a lesser degree of deference to "interpretive regulations," i.e., regulations adopted by the Treasury pursuant to its general authority to issue rules and regulations under Code section 7805(a). *E.g., Brown v. United States*, 890 F.2d 1329, 1338-39 (5th Cir. 1989); *CWT Farms, Inc. v. Commissioner*, 755 F.2d 790, 800 (11th Cir. 1985), *cert. denied*, 477 U.S. 903 (1986);

Anchor Hocking Corp. v. United States, 11 Cl. Ct. 173, 175 (1986). *Chevron*, however, was not the basis for that deference. *Chevron* has been broadened by a few courts to give a limited degree of deference to revenue rulings and other non-legislative interpretations by the Service. *E.g., Johnson City Medical Center v. United States*, 999 F.2d 973, 976 (6th Cir. 1993); *Weil v. Retirement Plan Admin. Comm. of Terson Co.*, 933 F.2d 106 (2d Cir. 1991). *But see, e.g., Davis v. United States*, 495 U.S. 472 (1990) (wherein this Court accepted the Commissioner's interpretation of a statute, but without citing *Chevron*, thereby suggesting that *Chevron* deference is not so broad as to cover an interpretive regulation or ruling by the Service); *Reich v. New York*, 3 F.3d 581, 587 (2d Cir. 1993) (*Chevron* deference is not given to interpretive regulations, and the respect to be given interpretive regulations depends upon their persuasiveness); *Watts v. United States*, 703 F.2d 346, 350 n.19 (9th Cir. 1983) (revenue rulings issued by the Service are entitled to no deference); *Gordon v. Commissioner*, 88 T.C. 630, 635 (1987) (same).

When the District Director and the Appeals Officer issued a proposed adverse determination and the Commissioner advanced a litigating position in this case, they were not acting under a specific Congressional grant of rulemaking authority as was present in *Chevron*. Neither was the supposed "statutory construction" by the District Director, Appeals Officer, or Commissioner enunciated in an interpretive regulation or ruling under the general grant of authority of Code section 7805(a). Indeed, the Commissioner's positions were advanced only in her role as a party to this specific controversy. This Court has stated that "[d]eference to what appears to be nothing

more than an agency's convenient litigating position would be entirely inappropriate." *Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 213 (1988) (referring in part to deference to an agency position as enunciated in *Chevron*).

Review of the Service's case-specific action is statutorily vested in the United States Tax Court, the United States District Courts, the United States Courts of Appeal, the United States Claims Court, and the United States Supreme Court, in accordance with the respective jurisdictions of these bodies. I.R.C. §§ 6213, 7422, 7476; 28 U.S.C. §§ 1254, 1346(a)(1). Deference to the Service's position taken while auditing or examining a taxpayer or during subsequent litigation effectively would deny the taxpayer the right to appeal an adverse administrative decision. *Cf. Williams Bros., Inc. v. Pate*, 833 F.2d 261, 265 (11th Cir. 1987) (stating that the mere litigating position of the Director of Office of Workers' Compensation Programs, United States Department of Labor, is not entitled to deference as claimants would be effectively denied the right to appellate review). The reading of *Chevron* advocated by Mr. Nash would render meaningless the statutorily vested review of the Service's actions.

Neither the Tax Court nor the Fifth Circuit in this case violated the principles of *Chevron*. The position of the Service that Mr. Nash alleges should be given deference was not enunciated by an arm of the agency authorized to promulgate a statutory construction on behalf of the Treasury; nor was the position taken pursuant to any delegated rulemaking authority. Thus there is no basis for granting Mr. Nash's petition for writ of certiorari on this ground.

II. THE FIFTH CIRCUIT'S HOLDING IN THIS CASE DOES NOT CREATE A CIRCUIT SPLIT WITH THE SECOND CIRCUIT REGARDING THE APPLICATION OF *CHEVRON*

Contrary to Mr. Nash's position, the Fifth Circuit's refusal to adopt the Service's case specific application of Code section 411(d)(3) does not conflict with the Second Circuit's application of *Chevron* in *Weil v. Retirement Plan Administrative Committee of Terson Co.*, 933 F.2d 106 (2d Cir. 1991). The Second Circuit in *Weil* did not defer to (or even give any greater weight to) the position of the Service as a party to a controversy with a taxpayer. The *Weil* court did defer to the Service's interpretation of Code section 411(d)(3). However, the Commissioner was not a party in *Weil*, and her statutory construction was not advanced either during the administrative examination of a taxpayer or as a litigating party. Rather, the Service's position was taken as an *amicus* in response to a specific request by the Second Circuit to help the Court resolve a controversy between two private parties. *Weil*, 933 F.2d at 108. In fact, the Second Circuit has expressly stated in a post-*Weil* opinion that an agency's "litigation posture is entitled to no deference." *Lewis v. Grinker*, 965 F.2d 1206, 1220 (2d Cir. 1992). *See also Skandalis v. Rowe*, 14 F.3d 173, 179 (2d Cir. 1994) (where the Second Circuit granted deference to an agency's *amicus* position and noted that the agency "is not a party to this action").

Moreover, there is no suggestion in *Weil* that the Second Circuit would have applied *Chevron* so as to require a reversal of the Tax Court in this case. Indeed, in its recent decision in *Wachtell, Lipton, Rosen & Katz v. Commissioner*, 26 F.3d 291 (2d Cir. 1994), which involved a

controversy between the Service and a taxpayer, the Second Circuit considered the various interpretive positions taken by the Commissioner and the taxpayer and ultimately concluded that the Tax Court committed no error in finding against the Commissioner's administrative and litigating positions. *Wachtell*, 26 F.3d at 297. In so holding, the Court made no mention of *Chevron* and appropriately gave the Commissioner's positions no greater weight than those of the taxpayer.

The decision in this case neither creates nor suggests a circuit split between the Fifth and Second Circuits with respect to the proper application of *Chevron*. Thus there is no split to be addressed by a review of this case.

III. THIS CASE DOES NOT INVOLVE A QUESTION OF IMPORT TO THE GENERAL PUBLIC THAT SHOULD BE ADDRESSED BY THIS COURT

Finally, Mr. Nash contends that certiorari should be granted because the underlying issue of partial termination "affects large numbers of persons throughout the United States." Mr. Nash's implication is that this case involves an erroneous ruling on an important question of federal law that must be corrected by this Court.

Contrary to this implication, the decision of the Tax Court was solidly grounded on sound authority in the partial termination case law. In reaching its determination, the Tax Court properly and exhaustively dealt with the factual record and reached a fact-specific conclusion. It did not propose to create new law, nor did it disapprove of or refuse to follow any controlling precedent.

In affirming the Tax Court, the Fifth Circuit articulated no legal principles. Rather, it simply affirmed that the Tax Court had applied appropriate legal standards to the facts present in the administrative record. This affirmance did not generate erroneous or misleading legal precedent that need be corrected by this Court.

Mr. Nash's true complaint is that the courts below did not believe that the facts and circumstances supported a finding of a partial termination. The rulings made below were fact-specific as to the Halliburton Plan. There is nothing about the result or the reasoning of either opinion that justifies review by this Court.

CONCLUSION

For the reasons set forth above, the Petition for Writ of Certiorari seeking a review of the Fifth Circuit decisions in *Halliburton Company v. Commissioner* and *Halliburton Company, by Ken Nash v. Commissioner* should be denied.

Respectfully submitted,

DONALD F. WOOD
Counsel of Record
VINSON & ELKINS L.L.P.
1933 First City Tower
1001 Fannin Street
Houston, Texas 77002-6760
(713) 758-2608

Counsel for Respondent
Halliburton Company

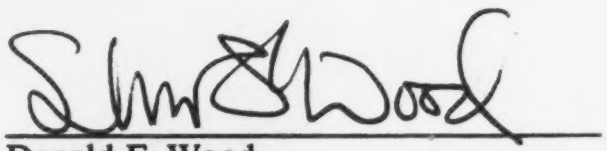
CERTIFICATE OF SERVICE

I hereby certify that on October 24, 1994, true and correct copies of Respondent Halliburton Company's Brief in Opposition to Petition For Writ of Certiorari were sent by United States postal service, certified mail, return receipt requested, to:

Gary R. Allen
Chief, Appellate Section
Tax Division
Department of Justice
P. O. Box 502
Washington, D.C. 20044

Solicitor General
Department of Justice
Washington, D.C. 20530

Kenneth L. Nash
15238 Highsprings Drive
Houston, Texas 77068



Donald F. Wood
Counsel of Record
for Respondent
Halliburton Company